



The Comptroller General  
of the United States

Washington, D.C. 20548

# Decision

Matter of: Superior Engineering and Electronics Co., Inc.  
File: B-224023  
Date: December 22, 1986

## DIGEST

1. The Small Business Administration, not the General Accounting Office, has the statutory authority to conclusively determine whether a concern is a small business for the purposes of a particular procurement.
2. General Accounting Office does not consider protests concerning the legal status of a firm as a regular dealer or manufacturer under the Walsh-Healey Act. Rather, the contracting agency determines the questioned firm's status, subject to review by the Small Business Administration if the offeror is a small business concern.
3. Contracting agency has the authority to make an award under a total small business set-aside for electronic warfare equipment notwithstanding a size protest or a protest contesting the legal status of a firm as a regular dealer or manufacturer under the Walsh-Healey Act, where the contracting officer reasonably determines that bona fide military operational needs, including requirements of a Naval warship, will not permit any delay in the award of the contract.

## DECISION

Superior Engineering and Electronics Co., Inc. protests the award of a contract to Jonathan Corporation under request for proposals (RFP) No. N00189-85-R-0378, issued by the Naval Supply Center, Norfolk, Virginia. The RFP was for the repair, overhaul and modification of electronic and electrical warfare equipment as well as for technical support for the installation of electronic and electrical warfare support systems. Superior advances several bases for protest which we discuss individually below.

We deny the protest.

## BACKGROUND

The RFP was issued on June 26, 1985, as a total small business set-aside. The Navy received a proposal from Jonathan and a proposal from Superior, the incumbent. After

technical evaluation, both proposals were determined by the Navy to be technically acceptable, and, in fact, were found to be essentially technically equal. After receipt of best and final offers, the final cost evaluation results were as follows:

<u>Contractor</u>	<u>Total Price</u>
Jonathan	\$36,912,159
Superior	\$41,783,991

On August 14, 1986, the contracting officer notified Superior that the apparent successful offeror under the solicitation was Jonathan. Further, the contracting officer informed Superior that it had until August 21, 1986, to file a protest concerning the small business size status of Jonathan.

On August 21, Superior filed a protest with the contracting officer alleging that Jonathan was not a small business concern and that Jonathan was not a regular dealer or manufacturer as required by the Walsh-Healey Act, 41 U.S.C. § 35-45 (1982); Superior also protested the allegedly improper and premature opening by a procurement official of its proposal in August 1985, prior to the closing date for receipt of initial proposals.

On the following day, August 22, 1986, the contracting officer made a written determination to proceed with the contract award notwithstanding the protest because of the "unusual and compelling urgency of this requirement." Award was thereafter made on that day to Jonathan. Superior then filed its protest with our Office on August 28, 1986. Subsequently, on September 5, 1986, the Navy's Head of Contracting Activity, pursuant to the Federal Acquisition Regulation (FAR), 48 C.F.R. § 33.104(c)(2)(ii) (1985), made a determination to continue contract performance "because urgent and compelling circumstances that significantly affect the interests of the United States will not permit waiting for GAO's decision." Meanwhile, the contracting officer, on August 29, 1986, 8 days after receiving Superior's protest, filed on his own behalf a size protest with the Small Business Administration (SBA) regarding Jonathan's small business size status, relying on the evidence furnished by Superior in its protest to the contracting officer. Apparently, the contracting officer intended his size protest to be a referral to the SBA of Superior's prior protest. By decision dated October 3, 1986, the SBA Philadelphia Regional Office ruled that Jonathan was other than a small business,

exceeding the solicitation's 750-employee size standard. Jonathan is currently appealing the matter to the SBA's Office of Hearings and Appeals.

#### CONTENTIONS BY SUPERIOR

First, Superior here again asserts that Jonathan is not a small business concern since the firm has more than 750 employees. Superior requests that performance of Jonathan's contract be suspended until a final determination by the SBA and that our Office consider the matter because the contracting officer unreasonably delayed referral to the SBA of Superior's size protest until 8 days after it was filed, which allegedly constituted bad faith. Superior also requests that if SBA finally determines Jonathan to be other than a small business, then Jonathan's contract be terminated and award made to the next low offeror, Superior. Second, Superior questions whether Jonathan is a regular dealer or manufacturer as required by the Walsh-Healey Act and requests that our Office require the Navy to suspend performance under the awarded contract pending a determination by the SBA. Superior requests that if Jonathan is determined to be ineligible under the Walsh-Healey Act, then Jonathan's contract be terminated and award made to Superior. We also consider below other allegations raised by Superior.

#### ANALYSIS

This Office does not review size status protests since 15 U.S.C. § 637(b) (1982) empowers the SBA to conclusively determine matters of small business size status for Federal procurements. A&R Window Cleaning & Janitorial Serv., Inc., B-197612, Mar. 28, 1980, 80-1 CPD ¶ 231. Similarly, as provided by our Bid Protest Regulations, our Office does not consider the legal status of a firm as a regular dealer or manufacturer under the Walsh-Healey Act. See 4 C.F.R. § 21.3(f)(9) (1986). Rather, the contracting agency determines the questioned firm's status, subject to review by SBA if the offeror is a small business concern. See W.H. Compton Shear Co., B-208626.2, Oct. 3, 1983, 83-2 CPD ¶ 404; FAR, 48 C.F.R. Subpart 22.6. Our role in these cases (size or Walsh-Healey protest) is therefore limited to considering whether the contracting officer has met his regulatory procedural responsibilities. See Bob McDorman Chevrolet, Inc. and Jack Roach Cadillac, B-200846 et al., Mar. 13, 1981, 81-1 CPD 194; Southeastern Enterprises, Inc., B-195084, Feb. 5, 1980, 80-1 CPD ¶ 90.

In this regard, when a procurement is set aside for small business, the contracting officer generally is required to inform unsuccessful offerors, before award, of the name and location of the apparent successful offeror, providing the other offerors with an opportunity to file a timely, i.e. pre-award, size status challenge. Notice is not required, however, when the contracting officer determines that the urgency of the requirement necessitates award without delay. FAR, 48 C.F.R. § 15.1001(b)(2). Further, where, as here, the contracting officer receives a timely size protest, the applicable regulations provide that he "shall not award the contract" until the SBA has made a size determination or 10 business days have expired since SBA's receipt of the protest, whichever occurs first, unless the contracting officer "determines in writing that an award must be made to protect the public interest." FAR, 48 C.F.R. § 19.302(h)(1).<sup>1/</sup> We therefore have held that a premature award of a contract is subject to a timely size protest in the absence of an urgency determination. See Coronis Carpentry Co., Inc., 55 Comp. Gen. 439 (1975), 75-2 CPD ¶ 291; R.E. Brown Co., Inc., B-193672, Aug. 29, 1979, 79-2 CPD ¶ 164. Similar standards apply in the case of a Walsh-Healey protest. See AMCO Corp., B-213298, Apr. 2, 1984, 84-1 CPD ¶ 371; F&H Mfg. Corp., B-197341, Mar. 31, 1980, 80-1 CPD ¶ 240. However, if an agency awards a contract pursuant to a bona fide urgency determination, the notice requirements concerning size status are waived and any subsequent SBA determination that the awardee is other than small is prospective and termination of the contract is not required. See Triple A Shipyards, B-213738, July 2, 1984, 84-2 CPD ¶ 4.

Here, the contracting officer did comply with the notice requirements, informing Superior, before award, of the name and location of the apparent successful offeror, Jonathan. After receiving a timely protest from Superior, however, he then awarded the contract to Jonathan pursuant to an urgency determination. The Navy has not explained why, if the urgency existed, the contracting officer did not waive the notice requirements and make an earlier award. Even so, the regulations, as indicated above, clearly grant authority to the contracting officer to make an award after receipt of a size or Walsh-Healey protest when the public interest so requires or when items to be acquired are urgently required.

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<sup>1/</sup> The applicable regulations also permit an award with a Walsh-Healey protest pending where the "items to be acquired are urgently required." FAR, 48 C.F.R. § 22.608-4(a)(1).

Thus, the dispositive issue here is whether a bona fide determination was made by the contracting officer. The contracting officer's August 22, 1986 determination to proceed with the award was made only 3 days before Superior's existing contract was to expire. Superior essentially argues that no urgency existed because the Navy could have extended its contract pending the outcome of the protests. According to Superior, it is in current production on a daily basis of many of the items needed by the Navy so that it could have provided uninterrupted performance for these items. However, we know of no requirement for an agency to extend the services of an incumbent on a sole-source basis to alleviate the urgency that exists.

We have recognized that a military agency's assertion that there is a critical need for certain supplies carries considerable weight, and the protester's burden to show unreasonableness is particularly heavy. The Willard Co., Inc., B-199705, Feb. 18, 1981, 81-1 CPD ¶ 102. In his determination, the contracting officer stated that delay in awarding the contract would result in the inability of the Naval Electronics Systems Engineering Center, Portsmouth, Virginia to assist deploying ships in meeting their operational commitments. Among other things, work that would be delayed included the "22 and 7G" restoration and repair, antenna - couplers for the USS Saratoga, R-1051 receivers for scheduled overhauls, and installation interface units for the KW-46 Secure Communications Systems. The Navy's Head of Contracting Activity essentially restated the urgency of these tasks in his subsequent determination to continue performance. Obviously the urgency of a requirement is primarily for determination by the contracting agency which is intimately familiar with the criticality of its needs. Here, the Navy has identified specific items which it believes are urgently required for its operational needs. The protester has failed to establish that these are not in fact legitimate immediate needs of the Navy and we therefore find the Navy's determinations to be valid.

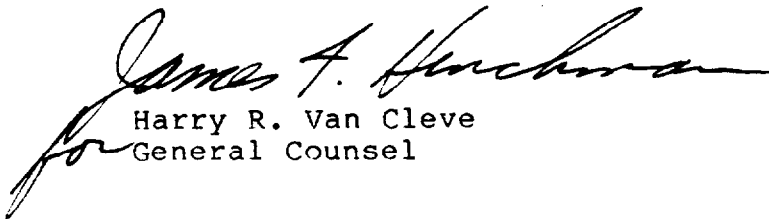
#### OTHER CONTENTIONS

Superior also complains in its written comments on the agency report that while it protested the status of Jonathan as a regular dealer or manufacturer on August 21, 1986, the contracting officer still had not referred the matter to the SBA by the time of the SBA regional determination of Jonathan's size status on October 3, 1986. We have been informally advised by the Navy that on August 29, 1986, it forwarded the entire Jonathan file to SBA in connection with Superior's size protest and that it was the Navy's intention for the SBA to also consider the Walsh-Healey matter raised by Superior.

The SBA, in its October 3, 1986 regional size status determination, however, states that no referral under the Walsh-Healey Act had been made by the contracting officer. In any event, as a result of our inquiry, the Navy now states that it is immediately again referring the Walsh-Healey matter to SBA to correct any misunderstanding that may have occurred. We therefore consider the matter academic.

Next, Superior alleges that its proposal, which was received before the initial closing date of August 2, 1985, was improperly opened for identification by a procurement official prior to the closing date even though the proposal was clearly marked with the correct identification. The Navy argues that this issue is untimely since these events occurred in August and September 1985, the protester was aware of these events at that time, and yet this protest was filed with our Office on August 28, 1986. The protest was filed more than 1 year after the events occurred with the knowledge of the protester and is therefore untimely. See 4 C.F.R. § 21.2 (1986). In any event, the record shows that the proposal was inadvertently opened by a procurement official and was thereafter promptly resealed. The protester has not explained how it was prejudiced by this inadvertent opening other than that the contract was eventually awarded to Jonathan 1 year after it occurred. Further, there is no evidence whatsoever in the record that Superior was prejudiced by this error. Accordingly, we deny this protest ground.

The protest is denied.

  
for Harry R. Van Cleve  
General Counsel